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No. 9

In the Supreme Court of the United States

OCTOBER TERM, 1959

JOHN FRANCIS NOTO

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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JOHN FRANCIS NOTO

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 438–450) is reported at 262 F. 2d 501.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1958 (R. 451). The petition for a writ of certiorari was filed on January 23, 1959, and was granted on October 12, 1959 (R. 452). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the conviction.

2. Whether the conviction was based on incompetent, irrelevant, remote, and prejudicial evidence.

3. Whether the immunity conferred by Section 4 (f) of the Internal Security Act of 1950 (50 U.S.C. 783(f)) bars prosecution of the offense charged in the indictment.

4. Whether the membership clause of the Smith Act is unconstitutional on its face or as applied to the facts of this case.

STATUTES INVOLVED

The pertinent provisions of the Smith Act (in the form applicable to this case[1]) and the Internal Security Act of 1950 (50 U.S.C. 781, *et seq.*) are set forth in Appendix A to Petitioner's Brief, pp. 85–90.

STATEMENT

Petitioner was charged in a one-count indictment (R. 1) returned on November 8, 1954, in the United States District Court for the Western District of New York with violation of the "membership clause" of the Smith Act, 18 U.S.C. 2385, proscribing membership in a society, group, or assembly of persons who teach, advocate, or encourage the overthrow by violence of the Government of the United States, knowing the purposes thereof. Specifically, the indictment charged that continuously, from January 1946 up to

[1] The statute has since been amended by the Act of July 24, 1956, c. 678, § 2, 70 Stat. 623, to provide for an increase of the maximum fine from $10,000 to $20,000 and an increase in the maximum sentence from 10 to 20 years. In addition, this amendment reinstated as part of 18 U.S.C. 2385 the special conspiracy provision which had been removed when the criminal code was revised in 1948.

the date of its filing (*i.e.*, November 8, 1954), petitioner was a member of the Communist Party, a society, group and assembly of persons who, throughout this period, taught and advocated the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, with knowledge that it did so teach and advocate and with intent to bring about such overthrow of the Government of the United States by force and violence as speedily as circumstances would permit (R. 1).

Following a trial by jury, petitioner was found guilty on April 12, 1956 (R. 436), and was thereafter sentenced to five years' imprisonment (R. 435, 436–437). On appeal to the Court of Appeals for the Second Circuit, the judgment of conviction was affirmed on December 31, 1958 (R. 451). This Court granted certiorari on October 12, 1959, and ordered the case set for argument immediately following reargument in *Scales* v. *United States*, No. 8, this Term (R. 452), another prosecution under the "membership clause" of the Smith Act.

The evidence adduced by the government may be summarized as follows:

A. GENERAL EVIDENCE, NOT SPECIFICALLY LINKED TO PETITIONER, ESTABLISHING THE CHARACTER OF THE COMMUNIST PARTY AS AN ORGANIZATION WHICH DURING THE INDICTMENT PERIOD TAUGHT AND ADVOCATED THE FORCIBLE OVERTHROW OF THE GOVERNMENT OF THE UNITED STATES AS SPEEDILY AS CIRCUMSTANCES WOULD PERMIT

A mass of evidence was introduced by the government to prove that the Communist Party, during the

indictment period (1946–1954), taught and advocated the forcible overthrow of the Government of the United States as speedily as circumstances would permit. We set forth in the Appendix, *infra*, pp. 61–68, a summary of so much of this evidence as was not specifically linked at the trial to the petitioner, but was directed generally to the character and activities of the Communist Party as an organization, knowing membership in which is proscribed by the Smith Act.

B. EVIDENCE, SPECIFICALLY LINKED TO PETITIONER, FURTHER ESTABLISHING THE CHARACTER OF THE PARTY AS AN ADVOCATE OF FORCE AND VIOLENCE, AND SHOWING PETITIONER'S KNOWLEDGE OF THAT CHARACTER AND HIS INTENT WITH RESPECT TO VIOLENT OVERTHROW AT THE EARLIEST FEASIBLE OPPORTUNITY

Petitioner was an active, informed, well-disciplined, high-level member of the Communist Party for a period of more than twenty years. At least as early as 1946, he held high-level Party offices in western New York. In that year he was Organizational Secretary of Erie County (R. 257, 263, 327, 333–334), and in 1947 he was made Erie County Chairman (R. 145, 159, 257, 264, 327, 335–336). Beginning in 1948, and continuing throughout the indictment period (1946–1954), he was Chairman of the Western New York sub-district of the Communist Party (R. 6, 146, 257, 289, 328, 350).[2] As such, he was responsible for

[2] The Western New York sub-district was formed at a conference held in Buffalo in 1946 and attended by such state and national leaders of the Party as William Z. Foster and Robert Thompson (R. 332–333). The sub-district, which was also known as the "Upstate District" (R. 333), comprised an area

the Party's activities in that sub-district and his responsibilities included providing leadership and guidance to other Party functionaries, building the Party's numerical strength, and developing future leaders among his co-workers (R. 146). In addition, he was a member of the New York State Committee and the State Board (R. 147, 149–150, 163) and attended Party county, state, and national conventions (R. 148, 151, 275–276, 350–352).

The evidence summarized below, unlike that summarized in the Appendix (*infra*, pp. 61–68), relates mainly to petitioner's own statements, actions, and conduct. In addition to constituting further evidence—supplementing that set forth in the Appendix—of the character of the Communist Party as an organization which advocates the violent overthrow of the Government of the United States at the earliest feasible opportunity, it shows petitioner's personal knowledge of, intent with respect to, and activities in furtherance of, the Party's violent revolutionary aims and purposes.

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within the state of New York bounded on the east by a line drawn through Watertown and on the south by a line drawn through Utica and Binghamton. It included, in addition to these cities, the cities of Syracuse, Rochester, Buffalo, and Niagara Falls (G. Ex. 7, R. 6–7). According to petitioner's own figures, there were, in the fall of 1949, 1,200 "well educated, well trained" Party members in this area (R. 291). A sub-district, in the Party's organizational structure, was a unit which was one level higher than a section and one level below a district (R. 19).

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1. PETITIONER'S PARTICIPATION IN THE PARTY'S PROGRAM OF SYSTEMATIC TEACHING OF THE PRINCIPLES OF MARXISM-LENINISM, INCLUDING ADVOCACY OF VIOLENT OVERTHROW AT THE EARLIEST FEASIBLE OPPORTUNITY

Petitioner received his early training for positions of leadership in the Party in the period from 1933 to 1938 when he was first, a member, and later, president, of the Rochester Young Communist League (R. 207–210), "a training ground for young people in the principles of Marxism and Leninism" (R. 207).[3] Witness Dietch testified that he and petitioner, as members of a Young Communist League club in Rochester, New York (R. 207), attended a series of educational meetings conducted by that group in 1935 and 1936 (R. 210–228, 254–255). In the first series of lectures, which were conducted by Jim West, a Young Communist League organizer from Buffalo (R. 211), the group studied a pamphlet entitled *Young Communists and the Path to Soviet Power* (G. Ex. 64, R. 210–218). The pamphlet noted that the 13th Plenum of the Communist International had "estimated the present situation as one of a new round of revolutions and wars, and that the struggle for Soviet power is on the order of the day." It also

[3] Witness Dietch testified that the Young Communist League was the "Youth Army of the Communist Party, * * * a training ground for young people in the principles of Marxism and Leninism, * * * to school them to be future Party members" (R. 207). In *Why Communism?* (G. Ex. 11, R. 49), published in 1935 (R. 49), the author, M. J. Olgin, who was then a leader of the Communist Party (R. 220), described the League as "the revolutionary organization of the young workers" which functions "[h]and in hand with the Communist Party and under its guidance" (G. Ex. 11, p. 71; R. 227).

stated that "every leading Comrade, every league member" should study a report (which was contained in the pamphlet) by Comrade Chemadanov to the Plenum of the Young Communist International, "so as to prepare for the coming decisive class struggles" (G. Ex. 64, p. 4; R. 212). The Chemadanov report urged League members to infiltrate into factories and mills, organizations, universities, schools, and "wherever the youth are to be found", "to carry on the propaganda of Leninism" in order to give the youth "a revolutionary, clear and plain outlook." It further declared that this revolutionary propaganda was to be backed up "by concrete revolutionary actions" in the form of active participation in the class struggle and in strikes under the leadership of the Communist Party so that the youth "will understand that there is no other way out of the crisis except the revolutionary way" (G. Ex. 64, p. 21; R. 215).

In the summer of 1935 [redacted]tch and petitioner attended another series of Young Communist League classes held at the Communist Party headquarters in Rochester (R. 218, 254–255). The subject matter studied and discussed at these classes was Lenin's *State and Revolution*[4] (G. Ex. 66, R. 219, 255),

[4] The class particularly discussed the portion on class society in the state (R. 219). Included in that section is the following passage (Gov. Ex. 15, p. 19; R. 139):

> We have already said above and shall show more fully later that the teaching of Marx and Engels regarding the inevitability of a violent revolution refers to the bourgeois state. It cannot be replaced by the proletarian state, the

Dietch testified as follows to what the students at these classes were taught (R. 255):

> The instructor at that class, Phil Parr, stated since no ruling class in history had ever been known to willingly surrender its state power without a violent conflict, and that the American ruling class would not be any exception, consequently there would be no alternative and it would be historically necessary for us to resort to forceful and violent means to overthrow our own ruling class, and in that manner to win state power or, and to establish the dictatorship of the proletariat, which would eventually with the withering away of the state develop into socialism and ultimately into a Communist classless society, which was the ultimate aim of the Party.

In the summer of the following year, Dietch and petitioner attended another series of Young Communist League classes held in Rochester (R. 220). At these classes, M. J. Olgin's *Why Communism?* (G. Ex. 11, R. 48) was studied "pretty well in its entirety" (R. 220). This book contains a frank expression of the Party's aims and objectives (G. Ex. 11, pp. 32, 42, 60, 61; R. 221, 224, 225):

> dictatorship of the proletariat through withering away, but, as a general rule only through a violent revolution.
>
> * * * * * * *
>
> The replacement of the bourgeois by the proletarian state is impossible without a violent revolution.

The substance of this passage was also taught in the 1941 National Training School and in the party classes Lautner taught from 1946 to 1948 (R. 139–140).

The capitalist state is a glaring fact. It is flesh and blood of the capitalist system. It stands in the way of the workers' program towards a new free life. Can it be abolished by gradual transformation? Those who say it can are the staunchest supporters of the capitalist robbers and the most active promoters of imperialist wars. Their theory is not harmless, indeed it is a poisonous theory. It is a smoke screen behind which cruel capitalist exploitation is hiding. We Communists say that there is one way to abolish the capitalist state, and that is to smash it by force. To make Communism possible the workers must take hold of the state machinery of capitalism and destroy it.

* * * * *

We Communists do not say to the workers that they have to begin the civil war today or tomorrow. We say that the civil war is the inevitable outcome of long and arduous struggles against the capitalists and their state and that these struggles must be made the everyday practice of the working class.

* * * * *

Can it be Done? It has been done more than once. * * *

* * * * *

Can a revolution be won? Capitalism creates a situation where large masses of the people are dissatisfied, embittered, emboldened by intolerable hardships. Capitalism itself prepares the conditions for its cataclysm. If under conditions for a severe capitalist crisis the majority of the working class is ready to wage a de-

> termined armed fight for the overthrow of the capitalist system, then the revolution may be victorious, provided there is in existence a mass Communist Party recognized by the workers as their leader in struggles against capitalism.

Witness Geraldine Hicks first met petitioner at a general membership meeting in Buffalo late in 1946 when he was Erie County Organizational Secretary (R. 257). At this meeting, petitioner gave a short speech on recruiting and told the members that the county organization wanted to build a stronger Communist Party by recruiting as many new members as it could, especially among veterans, industrial workers, and youth groups (R. 263). However, at a meeting a few months later, when a Party member suggested that the Party hold public meetings and distribute literature in the neighborhoods to stimulate interest, petitioner disapproved the suggestion, stating that Communists did not work that way and that they wanted people that they knew and could trust (R. 264–265).

In 1947, witness Charles Regan, who had joined the Communist Party in 1943 at the request of the F.B.I. (R. 325–326), received a notice which was signed by petitioner to attend a meeting on March 17th at Party Headquarters (R. 338). At this meeting, petitioner gave the main report in which he stated that "the present time we were going through was the same as in Marx and Lenin, and * * * it would eventually lead to a crisis" (R. 339). Shortly thereafter, petitioner attended a meeting of the Party's General Motors Club in Buffalo. At that meeting,

Elmer Lumpkin, another Party member, reported that a local newspaperman had recently visited his home and had asked him a lot of questions which he had answered. Petitioner became upset and admonished Lumpkin for permitting the newsman to enter his home and for answering his questions (R. 339–340). Referring to the reporter, petitioner said: "Sometime I will see the time we can stand a person like this S.O.B. against the wall and shoot him" (R. 340).

At another meeting that same year, petitioner described the United States as "the World's leading imperialistic country" (R. 340–341), and some time later he attended classes on the subject of imperialism, conducted by three leading Party members in the Buffalo area, at which Lenin's book on imperialism was used (R. 341–342; G. Ex. 17).

In the summer of 1947, petitioner announced that classes on Marxism would be held for industrial workers. Witness Regan was selected to attend these classes which were taught by Irving Weisman, a county organizer from Binghamton, New York, who Regan was told was one of the leading Marxists in New York State. Weisman used *Foundations of Leninism* (G. Ex. 13)[5] and *Left Wing Communism, An Infantile Disorder* (G. Ex. 16) in conducting the classes, and told the students that they were "very fortunate in having access to these books" and that "everything in these books was coming true today" (R. 342–343).

[5] Pertinent excerpts from this work are quoted in the Appendix, *infra*, pp. 64–65.

Witness Regan testified that he and petitioner attended two sessions of a series of Party classes conducted by Martha Lewis in the late summer of 1947. At these sessions, Miss Lewis used Stalin's *Foundations of Leninism* (G. Ex. 13), and particularly the section discussing the Communist Party (R. 344).* Witness Hicks was apparently describing these same classes when she testified that she attended, along with ten or twelve other persons including petitioner, two days of classes conducted by Miss Lewis at Party Headquarters in Buffalo in August 1947 (R. 266–267). Miss Hicks said that the subject at the first session was the Communist Party's relations with trade unions. The students were taught that the working class should be educated to know the importance of abolishing capitalism and establishing socialism

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*Included in this section is the following passage (G. Ex. 13, p. 107; R. 345–346):

> The new period is one of open class collisions, of revolutionary action by the proletariat, of proletarian revolution, a period when forces are being directly mustered for the overthrow of imperialism and the seizure of power by the proletariat. In this period the proletariat is confronted with new tasks, the tasks of reorganizing all Party work on new, revolutionary lines, of educating the workers in the spirit of revolutionary struggle for power * * *.
>
> * * * * *
>
> Hence the necessity for a new Party, a militant Party, a revolutionary Party, one bold enough to lead the proletarians to the struggle for power, sufficiently experienced to find its bearings amidst the complex conditions of a revolutionary situation, and sufficiently flexible to steer clear of all submerged rocks on the way to its goal.
>
> Without such a Party, it is useless even to think of overthrowing imperialism and achieving the dictatorship of the proletariat.

and that the best school for this would be the Communist Party (R. 267). The subject matter on the second day, Miss Hicks testified, was the Communist Party as the vanguard of the working class. Miss Lewis told the students that in order to be a real vanguard they "should have a knowledge of revolutionary theory" and that without this they would not be able to lead the working class (R. 267).

In the fall of 1947, a "going away" party was held in petitioner's honor to celebrate the occasion of his leaving the Buffalo area to attend the Party's National Training School in New York City (R. 346). After his return, he announced at the first general membership meeting, in January 1948, that the Party's National Board was concerned about security and expected the state and county organizations to act on their own initiative in instituting security measures. As Erie County Chairman he passed down the same directive to the Club leaders in Erie County (R. 347). At the same meeting, petitioner announced that educational classes would be held later that year on a book called *Theory and Practice of the Communist Party, First Course* (G. Ex. 71), to be taught by a teacher coming from New York City (R. 268–270).

At a general membership meeting for the Buffalo area, held in the spring of 1948, petitioner stated that the Party wanted to organize a strong American Marxist Party and, in connection with a Party "ideological campaign," called for the wide dissemination of *The Communist Manifesto* (G. Ex. 8), *History of*

the Communist Party, Soviet Union (Bolsheviks) (G. Ex. 20), and *Ten Classics of Marxism* (G. Ex. 73), which includes, among other works, *Foundations of Leninism* and *State and Revolution* (R. 270–272, 347–348, G. Ex. 72). At an enlarged County Committee meeting in May, he urged the necessity for "a strong revolutionary Party" and told the membership that "they should be a revolutionary group that should take action at the proper time" (R. 272).

In June 1948, petitioner presided at the Erie County Convention of the Party and spoke of the National Board's Draft Resolution for the forthcoming national convention. During the course of this speech he said that the capitalist class "was its own grave digger" and described Earl Browder—the former General Secretary of the Communist Party of the United States who had been expelled from the Party at the 1945 National Convention for supporting the "revisionist"[7] policies of peaceful coexistence with capitalism and the end of the class struggle (R. 87–105, 153)—as a "hand-shaker of Wall Street" (R. 274, 350–351).

In the summer of 1948, witness Regan attended the last session of a series of classes which had been taught by George Squires, a teacher at the Party's Jefferson School in New York City who had come to Buffalo to conduct the classes. Petitioner addressed the students and congratulated them on their activity, stating that he hoped that they would become leaders

[7] In Communist Party parlance, "revisionism" is a right deviation from Marxism-Leninism—"an effort to revise the basic concept of Marxism-Leninism" (R. 88).

of the Party in the future (R. 353). Al Lutzki, Erie County Organizer, announced at the same meeting that another series of classes would be held in the near future (R. 353). Regan attended these classes, conducted by Elizabeth Lawson, another teacher from the Jefferson School, which lasted about one full week. Regan recalled that during a particular session Miss Lawson said that a person had once asked her whether it was possible for him to own twenty pairs of shoes in the Soviet Union. Miss Lawson told the class that "he was the kind of a guy they hoped to shoot some day" (R. 353–354). County Organizer Lutzki, another instructor at this series of classes, taught a class on strategy and tactics. In discussing the work of the Communist Party in unions, he described Walter Reuther as a "social democrat." One of the students asked him what a social democrat was and Lutzki replied that "a social democrat was an evolutionist who waited for socialism" whereas "the Communist Party would achieve socialism through revolutions" (R. 354).

Witness Greenberg who, as a student, had joined the Communist Party in Niagara Falls, New York, in 1947 (R. 382–383), met petitioner in the fall of 1948 (R. 385–386). In October, petitioner discussed with Greenberg the starting of an educational program for the Party group in Niagara Falls (R. 386) and from time to time thereafter furnished the Niagara Falls group with many of the familiar Marxist-Leninist "classics," including the *Ten Classics of Marxism*, in connection with this educational program (R. 386–388). In the latter part of October 1948, petitioner

proposed to Greenberg the possibility of the latter's taking the job of organizer in Erie County but told Greenberg that it would be necessary for him to attend a Party school in New York City in preparation for the job (R. 388).

In November 1949, petitioner told a group of Party members that the top leaders of the Communist Party who had recently been convicted for violation of the Smith Act were "the finest people in the United States" because "they were willing to make any sacrifice, go to jail or lay down their lives to carry on the work" (R. 290–291). Shortly thereafter, petitioner began furnishing witness Joseph Chatley, a local Party member, who had joined the organization at the request of the F.B.I. the year before (R. 288), with Party literature (R. 291–294). In September 1950, he gave Chatley copies of *History of the Russian Revolution* (G. Ex. 75) and *The Proletarian Revolution and the Renegade Kautsky* (G. Ex. 76), and told him that the former volume was the best book that had ever come into his hands. At the same time, he told Chatley that if there were any points the latter did not understand after re-reading the book, he (petitioner) would be happy to clear them up (R. 294–295). During this same month, he told Chatley that "the time would come when there would be a show-down, working people will stand just so much." "It might take several years" he said, "it will result in bad times, but in the end it will result in a turn in the country to Marxism and Leninism." "[T]o bring it to that glorious end," he told Chatley, "he was willing to suffer anything" (R. 298).

2. PETITIONER'S PARTICIPATION IN THE PARTY'S PROGRAM OF CONCENTRATION ON THE NATION'S BASIC INDUSTRIES

As a leader of the Party's upstate sub-district, petitioner was also responsible for, and actively participated in, implementing in that district the Party's program of industrial concentration by which it concentrated its activities in basic industries and the largest industrial plants. In February or March 1947, petitioner instructed witness Regan to attend a conference in New York City for the purpose of creating a Communist Party commission within the United Auto Workers Union. Regan attended the conference and met with Hal Simon, the Party's New York State Trade Union Director, and others. They discussed penetration of the U.A.W. by the Communist Party and decided to concentrate on building the Party within various automobile manufacturing shops whose employees were represented by the U.A.W. The plan was to send Party members to the areas where these shops were located for the purpose of acquiring jobs, in the hope that they would eventually assume positions of leadership in the union. Simon instructed Regan to return to Buffalo to secure information for him regarding the number of Party members in that area who were members of the U.A.W. (R. 336–338). After Regan returned to Buffalo, he reported the results of the conference to petitioner (R. 336).

In the early part of 1948, petitioner announced at a general membership meeting in Buffalo a "Draft Building Plan for Erie County" (G. Ex. 72). This plan called for the recruitment of 135 new members

by July 31st, including 40 from the steel industry, 30 from the electrical industry, 6 from the brass industry, and 3 from the railroad (G. Ex. 72; R. 270–271). A short time later, he told other local members that the Party would concentrate on the General Motors Chevrolet Plant at Delavan Avenue in Buffalo, which he described as a "key" shop, and that Party members from New York City were coming to Buffalo to try to get jobs at the plant (R. 348–349). Subsequently, Party members from Corning, New York (R. 349), and New York City (R. 359–360), came to Buffalo for this purpose.

In August 1948, Russell De Pasquale, the Party's local director of steel concentration, gave Regan a pamphlet containing instructions on steel concentration (G. Ex. 86) which directed every club to discuss it at the next meeting. According to the pamphlet, the three basic industries were steel, railroads, and mining. "These are basic to the National economy, that is if any one or all three are shut down by strike our economy is paralyzed. It is necessary for a Marxist revolutionary party to be rooted in these industries" (G. Ex. 86; R. 352–353).

In January 1949, the upstate sub-district held a conference in Rochester on concentration work. Petitioner was present and gave the main report. He stated that the sub-district's principal task was to build the Party in the steel and electrical manufacturing shops in Buffalo (R. 356–357). Another speaker at the conference, Hal Simon, discussed the strategy and tactics of infiltrating into industrial shops and emphasized the importance of steel because

an "entire section of industry within the country depended on steel" (R. 357). Early that same year, petitioner attended another conference on concentration held in New York City. There were about 1,000 people at this conference including national leader Henry Winston and a host of top leaders of the New York State Communist Party. At the conference, petitioner presided over a discussion panel dealing with Party work in the shop (R. 357–358). He stated that the "Lenin method of work within the shop was to decide upon a particular dependent within the shop, that the shop as a rule depended upon, to suspend production * * *" (R. 358). Therefore, it was the job of every Communist to know the people, executives, and product of a company and to direct his attention on the key department or, better still, get a job in that department (R. 357–358). In September 1949, petitioner met in Buffalo with a number of Party members who were active in the industrial concentration program and laid plans for building a Communist Party club for railroad workers (R. 360).

In the fall of 1949, shortly after becoming a member of the Communist Party (R. 287–288), witness Chatley was asked to come to a meeting at the home of Michael and Frances Clune, two local Party members who had been influential in securing his membership. At the meeting, Chatley was introduced to petitioner who asked him a great many questions concerning his background in labor work, the unions he had been with, and the type of work he had done. Petitioner also asked Chatley what knowledge he had of Marxism-Leninism. Chatley replied that he knew

very little of Marxism or Leninism. Petitioner then told him that because of his work he would be extremely valuable to the Communist Party and most valuable if it were not generally known that he was a Party member. He advised that Chatley should "work it sort of underground" (R. 289–290). In March or April 1950, petitioner asked Chatley to try to get various union stewards to attend meetings of a group known as the East Side Business Group. He explained that if these stewards attended these meetings they would meet other Party members who might influence them to join the Party (R. 296–297).

3. PETITIONER'S ASSOCIATION WITH THE PARTY'S UNDERGROUND ACTIVITIES

Following the National Convention of the Communist Party in 1948, petitioner, who had attended as a delegate from the Western New York sub-district (R. 153), reported to the sub-district membership (at a meeting in August 1948) the results of the convention. He explained that fewer national committeemen had been elected at the 1948 convention than in 1945, because the Party had decided, in a security effort, to keep potential leaders out of office. He stated, however, that these people "would come forward in an underground movement and give leadership to the Party" (R. 351–352).

Witness Lautner's main assignment in 1948 and 1949 was to help build the underground organization of the Communist Party in New York State (R. 164). The job involved building a parallel organization with the existing structure of the Communist Party, inte-

grating about ten percent of the Party membership (R. 164). The problem was to find that ten percent of the Party membership which would enable the Party to function as an organized group under any and all conditions (R. 165). See Appendix, *infra*, p. 68. The key criteria for selection as part of this ten percent was to be absolute loyalty and devotion to the Party (R. 166). It was considered necessary to supply the underground organization with printing presses, money, hiding places for Party leaders, and "drop" places to leave written messages (R. 164–165). By 1950 the Party had organized the complete basic structure of the underground system in New York (R. 170).

In January or February 1949, petitioner and other county leaders were called in to Party headquarters in New York City and were briefed concerning the setting up of this underground apparatus and were told that they would be contacted later and informed of their role in the new system (R. 169). In accordance with instructions from his superiors, Lautner divided the State of New York into three underground "areas". Area One included New York County with all the industrial sections and the cultural division. Area Two included Kings, Queens, Bronx, and Westchester Counties. Area Three consisted of everything north of Poughkeepsie, including the Buffalo sub-district and the tri-city area of Albany, Schenectady, and Troy (R. 167). Petitioner was placed in charge of Area Three (R. 168–169).

In the spring of 1949, petitioner asked Lautner to

help him get a photo offset machine (R. 171).[8] Lautner agreed to furnish him with the machine if he would make arrangements for picking it up, which petitioner did (R. 172). Sometime later, at a New York State Board meeting, petitioner told Lautner that the driver of the truck which picked up the printing press suspected that he had been followed. At the same meeting, Lautner agreed to supply Area Three with forty-five hand mimeograph machines (R. 172).[9] In the late summer of 1949, petitioner contacted witness Greenberg, who owned a dry-cleaning establishment in Niagara Falls, and discussed with him the possibility of setting up the photo offset machine, which petitioner had acquired from Lautner, in Greenberg's establishment. Petitioner told Greenberg that he was looking for a suitable location that would not be well known and assured him that if he agreed to have the machine set up on his premises petitioner would see that it was operated only after the close of business hours (R. 393).

In October 1949, Lautner was sent to Buffalo to meet with the top three men in that area, petitioner, Al Lutzki, and a person named Steele from Jamestown, and to check on the progress of the underground system in Area Three (R. 168, 170–171). Petitioner told Lautner that the photo offset machine had not yet

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[8] A photo offset machine is a high-speed printing machine that can produce as many as 3000 copies an hour. "It is powerful and good enough" to print pamphlets, folders, and leaflets, as well as other types of material (R. 171–172).

[9] These machines were manufactured by the Party itself in White Plains, New York, and were specifically designed to be taken apart for concealment purposes (R. 172–173).

been permanently installed but that he had one or two places in mind (R. 173). The two then went to Greenberg's dry-cleaning place in Niagara Falls to inspect it as a possible site. Upon inspection, however, Lautner rejected it because the floor was not solid enough to support the heavy equipment (R. 173–174, 393–394).

In June 1950, petitioner gave witness Hicks a questionnaire and asked her to fill it out. He explained that this was being done for security reasons as the Party was contemplating the necessity of operating underground and wanted to ascertain the loyalty of its members. The questionnaire contained about forty questions concerning the member's background in the Party, including inquiry whether the member was suspicious of any other Party member or knew of any member who "had turned sour to the Party" (R. 277).

In March 1951, petitioner contacted witness Dietch at his home in Rochester and told him that because of the political situation the Party might have to go underground and that therefore it was interested in setting up some sort of printing apparatuses (R. 235). He asked Dietch, who was a salesman in the printing equipment business (R. 234, 236), to go to Buffalo to keep a secret rendezvous with a person who would be known to him as "Jack" and to confer concerning the possible sale of some printing equipment (R. 236). Two weeks later, Dietch met "Jack" at a pre-arranged meeting place in Buffalo. Jack told him that the Party was interested in acquiring small, light-weight, portable, and easily dismantled printing equipment.

Dietch subsequently furnished "Jack" with two multi-lith presses (R. 236–238). "Jack" had the invoices (G. Exs. 69, 70) made out to a "Jack Phillips" of Falconer, New York. Both the name and address, however, were fictitious (R. 237).

In the spring of 1951, petitioner, in the company of an individual introduced only as "Jack," visited Greenberg in Niagara Falls. Petitioner discussed with Greenberg the possibility of storing printing or mimeographing equipment in his (Greenberg's) cellar (R. 394). Greenberg agreed and the following week he met "Jack" in Buffalo and picked up the equipment which he stored in the cellar of his home (R. 394–395). In the fall of 1951, Greenberg tried to contact petitioner but experienced difficulty. Finally, sometime in the last two weeks of November, petitioner called Greenberg and they arranged for petitioner to send someone down to pick up the printing equipment and to find some other place to store it (R. 395).

In the spring of 1951, petitioner asked witness Chatley to come to his home. When Chatley arrived, petitioner escorted him out the rear door to the back yard and told him that he (petitioner) had been given an assignment which required Chatley's assistance. Petitioner told Chatley that "[t]his will probably be the most important thing you will ever do" (R. 299). He explained that "[o]ne of our top people" was trying to evade being picked up by the Government in connection with the "Atom Spy Ring business" and that it was necessary to get him out of the country before he was caught (R. 299). He asked Chatley

if the latter would harbor the man in his home for a few days before he continued on his trip westward. Chatley agreed to do so and petitioner told him that he would give him the details concerning the man's arrival and departure in a few days (R. 300). A few weeks later, petitioner called Chatley and arranged to give him these details (R. 300–301). The expected harboring of the fugitive, however, apparently never materialized (R. 301). In the summer of the same year, petitioner contacted Greenberg and asked him to locate some homes in Niagara Falls where Party members could stay in the event that they had to go into hiding. Greenberg told petitioner that he would see what he could do (R. 395).

During this period, petitioner himself was contemplating going (and later did go) underground. In November 1949, he told Chatley never to contact him by telephone but to arrange meetings with him through a third person. He also told Chatley that if he was ever called by petitioner the latter should avoid using his name on the phone (R. 291).

In September 1951, petitioner told Chatley that he expected to be picked up by the authorities "almost daily". Chatley asked him what he was going to do. Petitioner replied that he had been in contact with his superiors and had asked for instructions but as of that date had not received any. He told Chatley that whatever those instructions were he would follow them because he was willing to endure any hardship in order that the work go on. "He was," he told Chatley, "even willing to lay down his life" (R. 301). About the same time, petitioner told witness Regan that

"he was going under a disguise to conceal himself" (R. 368). He was growing a mustache and had had his hair cut short, crew-cut style (R. 368). About the middle of the month, he went to Chatley's home, appearing nervous and upset, and collected from Chatley a ten-dollar contribution to a fund to raise bail bonds for arrested Party members (R. 302). In October 1951, petitioner went to Regan's home to pick up a package of Party literature. His hair was longer and his mustache was much heavier. He told Regan that he was exhausted, that he had been doing a lot of traveling all over upstate New York, and that "he had to be on the move" (R. 369).

From 1953 to 1955, petitioner having left the Buffalo area, lived in and around Newark, New Jersey under the assumed name of Louis Peresi (R. 377–379, 396–398). He worked at the Goodyear Rubber Plant in that city (R. 400–407, 410–412).

SUMMARY OF ARGUMENT

I

The evidence supports the jury's findings.

A. In *Yates* v. *United States,* 354 U.S. 298, this Court construed the teaching and advocacy clause of the Smith Act as referring to the teaching and advocacy of violent governmental overthrow in the sense of a call to forcible action (now or in the future), as distinguished from mere discussion of an abstract principle. The Court was careful to point out that the action advocated need not be present action or even action at a fixed or foreseeable

future time. The trial judge here, unlike in *Yates*, instructed the jury that it could find petitioner guilty under the membership clause of the Smith Act only if it first found that the Party's teachings were calculated to incite persons to forcible action to overthrow the Government of the United States at an advantageous time—substantially the same instructions as were given in *Dennis* v. *United States*, 341 U.S. 494, and approved in *Yates*. The only issue here, therefore, is whether the evidence was sufficient to support the jury's finding.

The record contains substantial evidence that numerous Party leaders, including petitioner, had systematically engaged over a period of time in instructing Party members through classes, books, and periodicals in the Marxist-Leninist doctrine of violent, revolutionary overthrow of non-Communist governments, and had indicated clearly that the Government of the United States was one such government to be overthrown in this way. Considered in conjunction with the Party's *actions* during the same period, it is clear that the Party's inculcation of revolutionary aims and purposes was not intended as abstract discussion but as a call to violent action as soon as "the time [is] ripe." *Yates*, 354 U.S. at 332. Thus, the inference can reasonably be drawn that the Party's great emphasis on its program of industrial concentration, in which petitioner was an active participant, was action taken in order to acquire the power to paralyze the nation's basic industries when the time was ready for seizing power. Similarly, the establishment of an elaborate underground apparatus, able

to function as an organized group under all conditions, shows that the Party's advocacy of forceful and violent overthrow was no mere abstract discussion. It was such evidence of a disciplined underground organization, ready to take action based on Marxist-Leninist revolutionary dogma during periods of national emergency, which this Court indicated in *Yates* constituted evidence of "advocacy of action." 354 U.S. at 331–332.

The jury was also clearly and properly instructed that it must find that the Party advocated illegal action as defined in *Yates* within the limitations period from September 1, 1951, to November 8, 1954. As the court below held, the evidence of the Party's character, extending over a twenty-year period up to the eve of the limitations period, was sufficient to support a reasonable inference that its character continued unchanged. This inference was supported by proof tending to show that the Party's underground operated well into and through the limitations period.

B. The evidence is equally clear and sufficient to prove petitioner's unlawful knowledge and intent. Petitioner's status as a Party leader of such a rigidly disciplined and indoctrinated organization is in itself strong evidence that he knew what the Party was about, and intended to further its ends. In addition, the record shows not only that petitioner was a thorough student and teacher of Marxism-Leninism as applied by the American Communist Party, but also that he participated in Party activities which make

his knowledge and intent certain beyond reasonable doubt. Having attended meetings and conferences in which the Party's industrial concentration program and underground apparatus were discussed, and having instructed, in his role as Party leader in western New York, Party members in carrying out these activities, petitioner must have known and intended their illegal purposes. On this record, the jury had ample ground for finding the requisite knowledge and intent in petitioner's words, deeds, and history.

II

A. Petitioner, having failed to raise the issue in the court of appeals, lacks standing to challenge in this Court the admission of evidence received at his trial. In numerous decisions, the Court has refused to review issues not raised in the court of appeals, including questions concerning the proper admission or exclusion of evidence. See, *e.g.*, *Husty* v. *United States*, 282 U.S. 694, 701–702; *McLoughlin* v. *Raphael Tuck Co.*, 191 U.S. 267, 271. While the Court has agreed to review issues not raised below in exceptional circumstances, no such circumstances exist in this case. Petitioner was adequately represented in the courts below by counsel who obviously felt that petitioner's interests would be better served by relying on more substantial grounds than the objections which he had made to the admission of the evidence in the trial court. The fact that petitioner's present counsel apparently disagrees with his former counsel on this score does not justify ignoring an established policy of this Court.

B. In any event, the evidence petitioner attacks as inadmissible was relevant and competent.

1. The testimony of witness John Lautner concerning the aims and objectives of the Communist Party, the meaning of terms in the Party's Constitution, and in explanation of a particular passage appearing in *Political Affairs*, the Party's official theoretical organ, were all relevant to a material issue in the case—*i.e.*, the teaching and advocacy of the Communist Party during the indictment period. Lautner's long career as a high-level functionary of the Party until 1950 qualified him to testify as an expert concerning these matters. Thus, his opinion testimony, based on his experience in the Party and his previous testimony concerning the Party's teaching and advocacy, was competent testimony, relevant to a material issue.

2. It was also proper to receive evidence as to the nature and character of the Communist Party which was not directly linked to petitioner. The first element to be proved in a "membership" case is that the group or society was one which taught and advocated the forcible overthrow of the Government. To limit such proof to acts and statements of the particular individual charged (or done or uttered in his presence) is unacceptable because the group's character cannot be established solely by proof of the acts and statements of an isolated individual. Instead, the character of an organization can only be shown by adducing evidence of the acts, statements and publications of its officers, leaders, and official spokesmen.

Nor was the evidence too remote to have relevance. On the contrary, the evidence here "contained links in Party teachings sufficient for the jury to find a continuity of Party purposes and teachings through the 1930's up to the indictment period." *United States* v. *Mesarosh*, 223 F. 2d 449, 455 (C.A. 3), reversed on other grounds, 352 U.S. 1. At the least, admission of this evidence was not an abuse of the trial court's discretion in deciding upon the relevancy of submitted evidence.

III

Petitioner argues that Section 4(f) of the Internal Security Act of 1950 was intended to immunize Communists from prosecution under the membership clause of the Smith Act. For the reasons outlined in the government's 1958 and 1959 briefs in *Scales* v. *United States*, No. 8, this Term (pp. 68–74 and 33–36, respectively), we submit that this contention is erroneous.

IV

The membership clause of the Smith Act is constitutional on its face and as applied in this case.

A. In the government's 1958 and 1959 briefs in *Scales* (pp. 38–56 and 5–33, respectively), we have shown, on the basis of the principles enunciated in *Dennis* and reaffirmed in *Yates*, that under any of a number of alternative interpretations the statute is valid on its face. We respectfully refer the Court to that discussion.

B. If, as we believe, petitioner has failed to show that the membership clause is void on its face, he

also fails to show its invalidity as applied to him. It was proved that the Communist Party teaches and advocates the overthrow of the Government by force and violence, that petitioner knew this, and that he personally intended the accomplishment of that objective. Petitioner was shown to be a Party leader in a significant area, teaching and advocating its doctrines, and actively working for their implementation. Petitioner's participation in the underground apparatus demonstrates that his activity in behalf of important Party purposes continued into and throughout the statutory period.

The fact that neither petitioner alone nor the Party as a whole had the power to overthrow the Government does not immunize him. It was no less clear in *Dennis* that the Party lacked such power currently or at least in the near future. *Dennis* thus teaches that Congress may act against "an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists * * *." *Dennis*, 341 U.S. at 509. This same power which allows Congress to act against a conspiracy to organize the Party is at least equally available to strike against the Party-in-being in the only way that the Party can function and be reached—through its members.

Petitioner claims that this Court in *Dennis* found a clear and present danger only because of the tense international situation at that time and that this situation no longer exists. This contention is obviously without substance. During most of the statutory period here (September 1951 to November 1954), which

began just after the beginning of the Korean War, the United States was engaged in armed combat against Communist North Korea and forces from Communist China. It scarcely requires argument that that period was not constitutionally less fraught with clear-and-present danger than was the time from 1945 to 1948, considered by the Court in *Dennis*.

ARGUMENT

I

THE EVIDENCE FULLY SUPPORTS THE VERDICT

A. THE EVIDENCE AS TO THE CHARACTER OF THE PARTY'S ADVOCACY OF VIOLENCE DURING THE INDICTMENT PERIOD MEETS THE *YATES* STANDARD OF A CALL TO FORCIBLE ACTION AT SOME FUTURE TIME

In *Yates* v. *United States*, 354 U.S. 298, 312–333, this Court construed the teaching and advocacy clause of the Smith Act as referring to the teaching and advocacy of violent governmental overthrow in the sense of a call to forcible action (now or in the future), as distinguished from "mere doctrinal justification of forcible overthrow" or the advocacy of force "as an abstract principle" (*id.* at 318, 321). In thus distinguishing between "advocacy of abstract doctrine" and "advocacy of action" (354 U.S. at 320), the Court was careful to point out that the "action" advocated, to come within the Act's proscription, was not required to be present action, or immediately impending action, or even action to be taken at a fixed or foreseeable future time. Referring to the fact that what "was condemned in *Dennis* [v. *United States*, 341 U.S. 494]" was "*in-*

doctrination preparatory to action", and adverting to "the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough," the Court epitomized its ruling as relating to "advocacy or teaching in the sense of a call to forcible action *at some future time*" (354 U.S. at 320, 322, 329; emphasis added). When this time will occur is, necessarily, not calculable in advance. For, as the Court noted, the summons to present, or imminent, action will not come until "the time [is] ripe" (*id.* at 332). And that will occur only when the Party's leaders "fe[el] that the time ha[s] come for action" (*Dennis*, 341 U.S. at 511). Both *Dennis* and *Yates*, in short, make clear that the particular time in the future when the action advocated is to take place is unimportant so far as enforcement of the advocacy clause of the Smith Act is concerned; what is essential is that it be in fact *action* that is advocated, *i.e.*, forcible action to be taken by the persons to whom the advocacy is addressed, whenever the signal for such action is received from the Party leaders.[10]

The trial judge charged the jury that, in order to convict the petitioner, it must first find that the Party advocated overthrow of the Government in the sense of inciting persons to such action (R. 424, 426–427):

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[10] Obviously, this signal will not be given until the Party leaders think that the venture's prospects of success are good. It is clear, however, both from *Dennis* and *Yates*, that this is not a bar to the present enforcement of the Smith Act's prohibitions against present advocacy of future violence.

> In the orderly consideration of the case the first question for your consideration will be whether, between September 1st, 1951 and November 8th, 1954, the Communist Party of the United States was a group or society which was teaching and advocating the overthrow and destruction of the United States Government by force and violence as speedily as circumstances would permit. * * *
>
> * * * * *
>
> It is not unlawful for a person or group of persons to believe or to teach that the Government of the United States should be completely changed. It is not unlawful to publicly advocate and urge a complete change in the government by peaceful and constitutional means. * * *
>
> It is not unlawful to teach that the Communist Party founded by Marx and Lenin actually did advocate force and violence as a means to accomplish the aim of the party at that time. * * * It is entirely lawful to teach that Marx and Engels advocated a revolution by force and violence. *But it becomes unlawful when persons are urged to action to overthrow by force and violence the Government of the United States when the time becomes appropriate. It is the use of language reasonably calculated to incite persons to action at the advantageous time to use force and violence or destroy the United States Government that is made unlawful by statute.* [Emphasis added.]

These instructions were substantially the same as those given in *Dennis*, 341 U.S. at 511–512, which were approved in *Yates*, 354 U.S. at 315–316, 317, n.

19. Thus, it is clear that the jury found, based on proper instructions, that the Party's advocacy met the standard of "advocacy of action" articulated in the *Yates* opinion. The only question here, then, is whether the evidence supports this jury finding. We submit that it does.[11]

The record contains substantial evidence that numerous Party leaders, including petitioner, had systematically engaged over a considerable period of time in instructing Party members through classes, books, and periodicals in the Marxist-Leninist doctrine of violent, revolutionary overthrow of non-Communist governments (see *supra*, pp. 6–16, and *infra*, pp. 61–68), and indicated clearly that the Government of the United States was one such government to be overthrown in this way (see, particularly, *supra*, pp. 7, 8, 16, and *infra*, pp. 62–63, 65–66). Taken alone, this evidence might conceivably be viewed as showing no more than "advocacy of abstract doctrine." But, when

[11] In *Yates*, the charge was that the defendants themselves had conspired to advocate violent revolution. In a "membership" case, such as this, the charge is membership in an organization (namely, the Communist Party) which during the pertinent period so advocated, with the requisite knowledge and intent. The *Yates* holding of what properly constitutes advocacy of forcible overthrow under the Smith Act is thus equally germane and relevant to a membership case. The difference is that, in a "conspiracy to advocate" case (such as *Yates*) it is necessary to prove that *the defendant*, personally, conspired to engage in the forbidden advocacy; in a "membership" case it suffices to prove that *the Party* (as such, and not necessarily including the defendant) engaged in the forbidden advocacy *and* that the defendant was a member of the Party with the necessary knowledge and intent.

seen in conjunction with the Party's *actions* during the same period, it is clear that the Party's inculcation of revolutionary aims and purposes was not intended as abstract discussion, but was in fact "advocacy of violent action to be taken at some future time" when "the time [is] ripe." Thus, the inference could reasonably be drawn that the Party's great emphasis, both in word and deed, on its program of industrial concentration (*supra,* pp. 17–20, and *infra,* pp. 66–67), in which petitioner himself was an active participant (*supra,* pp. 17–20), was action taken in order to acquire the power to paralyze the nation's basic industries when the time was ready for violent revolution. Just as industrial concentration was crucial to Soviet success in the Russian Revolution, similarly it can reasonably be inferred that this was one of the initial steps of putting the Party in this country in an advantageous position to seize power by force and violence as soon as possible. In fact, the record shows that it is a basic doctrine of the American Communist Party that the time for revolutionary and violent overthrow of the Government will come when the "objective" conditions—such as an economic crisis or war—coincide with the "subjective" conditions—the Party's leadership of the working class (*infra,* pp. 62–63).

The establishment of an elaborate underground apparatus likewise shows that the Party's advocacy of forceful and violent overthrow was no mere abstract discussion. The Party decided in 1948 to set up a national underground organization in order to

be able to function as an organized group under any and all conditions. Pursuant to this policy a national organization was to be established which consisted of a seven-level pyramid of the most loyal and disciplined ten percent of the Party's members. Each level from the top down contained a larger number of three-member groups, each group connected to a single member of a three-member group at a higher level. Each Party member knew only the two other members in his own group, a single member from a higher level, and three other members at a lower level—an arrangement which obviously protected the secrecy of the organization. In addition, "horizontal" aspects of the communications system included printing presses, "drop places" for leaving messages, and hiding places for Party leaders. By 1950, these places had been implemented in New York to the extent that the underground apparatus had been established down to the seventh level and mimeographing machines were being manufactured to supply the system (see *infra,* p. 68). And, more specifically, petitioner, as the leader of Area Three of the New York underground organization, set up in that area an apparatus which included printing presses, the use of code names, hiding places for Party leaders, pre-arranged secret meetings, and disguises (see *supra,* pp. 20–26). It was such evidence of a disciplined underground organization, ready to take action based on Marxist-Leninist revolutionary dogma during times of national emergency, which this Court

indicated in *Yates* constituted evidence of "advocacy of action." See 354 U.S. at 331–332.[12]

Petitioner argues (Pet. Br. 30–31) that the evidence concerning the Party's advocacy of violent overthrow was insufficient because the government did not adduce any evidence of such advocacy within the period not barred by limitations. The jury, however, was clearly and properly instructed that it must find that the Party advocated illegal action (as defined in *Yates*) within the limitations period from September 1, 1951, to November 8, 1954 (R. 423–424; see *supra*, p. 35). The court below held (R. 441–442; 262 F. 2d at 505) that the evidence of the Party's character, extending over a twenty-year period, was sufficient to

[12] Petitioner's contention (Pet. Br. 25–31) that the holding of the court below is inconsistent with *Yates* is based largely on the assumption that the evidence in this case is identical or, at least, substantially similar to the evidence in the *Yates* record. Though, concededly, the general pattern of the evidence in this case is similar to that in *Yates* (as it is likewise similar to the pattern of evidence adduced in *Dennis* and other Smith Act cases) we submit that it is misleading and unrewarding to undertake a general comparison of the unique factual patterns of the two cases. See, *e.g.*, *United States* v. *Silverman*, 248 F. 2d 671, 677 (C.A. 2), certiorari denied, 355 U.S. 942. The determination of the Court in *Yates* that the requisite advocacy of forcible action was lacking was limited to the proof on that issue adduced in that case. With the exception of witness Lautner, none of the witnesses in this case who testified with respect to the Party's advocacy of forcible overthrow—Dietch, Hicks, Chatley, Regan, and Greenberg—testified in *Yates*. Nor was the testimony of these witnesses a mere duplication of testimony found wanting in *Yates*. See our discussion, *supra*, pp. 36–39, concerning significant aspects of their testimony, particularly with regard to industrial concentration and underground activities, viewed in the light of the *Yates* standards.

support a reasonable inference that its character remained unchanged through the limitations period, in the absence of any evidence to the contrary. See, *e.g., Jencks* v. *United States,* 226 F. 2d 540, 548 (C.A. 5), reversed on other grounds, 353 U.S. 657; 2 Wigmore, *Evidence* (3d ed., 1940), § 437. Supporting this reasonable inference—that the character of the Party, revealed by ample evidence up to the eve of the limitations period, remained unchanged—the government introduced proof tending to show that the Party's underground apparatus continued well into and even through the limitations period.[13] Thus, the evidence showed that petitioner, having gone underground as part of the Party's program, continued to operate as a Party official in September and October 1951. As late as 1953 to 1955, petitioner was operating under another name while working in a basic industry in another state[14] (see *supra,* pp. 25–26). Though, as petitioner stresses (Pet. Br. 31), he did introduce some evidence pertaining to the indictment period calculated to show the Party's peaceful intentions (R. 415–419), the jury could have, and obviously did, discount

[13] It is hardly surprising that the record contains fewer direct references to the Party's advocacy of action in the limitations period than before, since the Party had gone underground and was taking security measures to prevent disclosure of its activities. And the evidence of these measures in itself indicates that the Party's basic character continued unchanged.

[14] Admittedly, the record does not explicitly state that petitioner's Party superiors ordered him to leave western New York to operate in Newark. But such an inference is reasonable in view of petitioner's position as a loyal, dedicated Party member, his statement (only two years before) that he would endure any hardship or do anything for the Party (R. 301), plus the fact that he was using a false name.

that evidence as unworthy of belief, especially since there was expert testimony in the record that Party leaders often used protective language in official documents to conceal the true meaning of what they were writing (R. 192–194).

In a Smith Act case, no less than in other kinds of criminal cases, it is for the jury to judge the credibility of the witnesses and to determine what inferences are to be drawn from the evidence (*Pierce* v. *United States*, 252 U.S. 239, 251), and inferences which might reasonably be drawn must, in deciding whether the evidence is sufficient, be viewed in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664. On that basis, it is submitted that the jury's finding under proper instructions that the Communist Party, during the pertinent period, taught and advocated the forcible overthrow of this Government, in the sense of *Yates*, is supported by the evidence.[15]

[15] Petitioner contends (Pet. Br. 30) that the court of appeals held that the incitement-to-action test enunciated in *Yates* is inapplicable, in a "membership" case, to the proof of the Party's advocacy. But while the court initially stated that "the incitement to action test enunciated in *Yates* * * * is inapplicable" (R. 449; 262 F. 2d at 509), it subsequently made clear that this statement referred only to the application of *Yates* to whether the defendant *personally* engaged in forbidden advocacy: "Since defendant was not indicted for *activities* the end result of which were to culminate in action on the part of others, it was not necessary that the evidence *of his activities* meet the *Yates* test" (R. 450; 262 F. 2d at 509–510; emphasis added). This interpretation of the court's opinion is strengthened by the fact that the government assumed, in its brief in the court of

B. THE JURY'S FINDING THAT PETITIONER KNEW THE PARTY'S CHARACTER AS AN ORGANIZATION WHICH ADVOCATED FORCIBLE OVERTHROW IN THE *YATES* SENSE, AND THAT HE PERSONALLY INTENDED TO BRING ABOUT THAT RESULT AS SPEEDILY AS CIRCUMSTANCES WOULD PERMIT, IS LIKEWISE SUPPORTED BY THE EVIDENCE

The evidence also justified the jury's finding that petitioner had knowledge of the Party's character as a society of persons who advocated the forcible overthrow of the Government in the *Yates* sense, and that he intended to bring about that result as speedily as circumstances would permit. Petitioner's status as a *leader* of such a rigidly disciplined and indoctrinated organization is in itself strong evidence that he knew what the Party was about and intended to further its ends. The record, however, goes beyond this. It not only includes evidence that petitioner was a thorough student of Marxism-Leninism as applied by the American Communist Party, but also contains numerous references concerning what petitioner did and said in his leadership capacity—from which the requisite finding of knowledge and intent could reasonably have been drawn.

For example, there is testimony from witnesses Dietch, Hicks, and Regan that petitioner attended many schools and classes at which both the basic Marxist-Leninist "classics" and the more recent writings of American Communist Party leaders were studied and discussed (see, *e.g.*, R. 210–227, 254–255, 266–267, 341–342, 344). At one of these classes, in Roch-

appeals, the applicability of *Yates* to the Party's advocacy. See Appellee's Brief, C.A. 2, No. 25156, pp. 2–37. In any event, as we have shown above (pp. 33–41), the evidence is sufficient to meet the *Yates* standards.

ester in 1935, petitioner was taught that there would be no alternative but to resort to forceful and violent means to seize power in this country (R. 254–255). At another, in Buffalo in 1947, he was instructed that without a knowledge of revolutionary theory the Communist Party would be unable to lead the working class in the task of abolishing capitalism and establishing socialism (R. 266).

At a general membership meeting in 1947, petitioner stated that the post-World War II era in this country "would eventually lead to a crisis" (R. 339). On another occasion, he spoke of a time when "they" (*i.e.*, Communists) would be able to stand people against a wall and shoot them (R. 340). At an enlarged Erie County Committee meeting in May 1948, he told the local Party membership that they should be "a revolutionary group that should take action at the proper time" (R. 272). On another occasion he praised arrested Party leaders because "they were willing to make any sacrifice, go to jail or lay down their lives to carry on the work" (R. 291).

In September 1950, he spoke with witness Chatley about a "show-down" which, though "[i]t might take several years" and "result in bad times," would end "in a turn in the country to Marxism and Leninism," stating at the same time that "he was willing to suffer anything to bring it to that glorious end" (R. 298). When he gave Chatley a copy of *History of the Russian Revolution* (G. Ex. 75), he told Chatley that, if there was anything Chatley did not understand after reading it, he (petitioner) would be happy to clear it up (R. 294–295). Sometime later, he told Chatley

that he was willing to endure any hardship, even "lay down his life," so that the Party could continue its work (R. 301).

We submit that all of these acts and statements, together with petitioner's long history of Party identity and understanding of the Marxist-Leninist classics, support the jury's finding that he knew that the Party taught and advocated forcible overthrow of the Government (in the *Yates* sense) and that he intended to bring about that result. Moreover, petitioner actively participated as a leader in the Party's industrial concentration program (*supra*, pp. 17–20) and in the formation of its underground apparatus (*supra*, pp. 20–26)—which, as we have shown (*supra*, pp. 36–39), the jury could reasonably have inferred were the initial steps in effectuating the Party's "call to forcible action." And having established an elaborate underground apparatus in the area under his leadership, petitioner himself went underground. Since he attended meetings and conferences in which these activities were discussed, and since, in his role as Party leader in western New York, he instructed Party members in carrying them out, petitioner certainly must have known and intended their illegal purposes.

Given the nature of the offense, it cannot be expected, and it is not required, that there be more extensive evidence in the form of explicit statements by the petitioner announcing his own knowledge and intent. On this record, the jury had ample ground for finding the requisite knowledge and intent in petitioner's words, deeds, and history.

II

HAVING FAILED TO RAISE THE ISSUE IN THE COURT BELOW, PETITIONER LACKS STANDING TO CHALLENGE IN THIS COURT THE ADMISSION OF EVIDENCE RECEIVED AT HIS TRIAL. IN ANY EVENT, INADMISSIBLE EVIDENCE WAS NOT RECEIVED

A. PETITIONER LACKS STANDING TO CHALLENGE THE ADMISSION OF EVIDENCE RECEIVED AT THE TRIAL

Petitioner contends (Pet. Br. 35–41) that he was prejudiced by the admission of allegedly incompetent, irrelevant, and remote evidence. Though he made timely objection at the trial to the admission of this evidence, he abandoned his objections by failing to raise this issue in the court below. See Appellant's Brief, C.A. 2, No. 25156, p. 4. Accordingly, the issue was not considered by the court of appeals (see R. 438–450; 262 F. 2d 501); nor was it the duty of that court to search the record in order to do so. See, *e.g.*, *Watts* v. *United States*, 220 F. 2d 483, 485 (C.A. 10), certiorari denied, 349 U.S. 939; *McKenna* v. *United States*, 232 F. 2d 431, 438 (C.A. 8).

We submit that under these circumstances petitioner should not be permitted by raising the issue here to breathe new life into an issue previously allowed to die, by his own choice, in the court below. "Only in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U.S. 339, 362–363, n. 16; see, *e.g.*, *Duignan* v. *United States*, 274 U.S. 195, 200; *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 239. And in applying this rule, the Court has stayed its hand where the issue raised involves a question

concerning the proper admission or exclusion of evidence—the same issue which petitioner seeks to raise here. See, *e.g., Husty* v. *United States,* 282 U.S. 694, 701–702; *McLoughlin* v. *Raphael Tuck Co.,* 191 U.S. 267, 271.

We realize, of course, that the Court has power to notice "[p]lain errors or defects affecting substantial rights" although they have not been called to the attention of the court below or even this Court. Rule 52(b), F.R. Crim. P.; Rule 40(1)(d)(2) of the Rules of this Court; see *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 411–412; *Sibbach* v. *Wilson, & Co.,* 312 U.S. 1, 16; *Weems* v. *United States,* 217 U.S. 349, 362. This power, however, is exercised "only in clear cases and in exceptional circumstances" (*Kessler* v. *Strecker,* 307 U.S. 22, 34), where "the errors are obvious, or * * * seriously affect the fairness, integrity or public reputation of judicial proceedings" (*United States v. Atkinson,* 297 U.S. 157, 160), such as, for example, the admission of evidence obtained in violation of the Fourth and Fifth Amendments, or the use of a confession illegally obtained. See, *e.g., Gambino* v. *United States,* 275 U.S. 310, 319; *Screws* v. *United States,* 325 U.S. 91, 107.

No such circumstances are presented here. Except for petitioner's broad claim (Pet. Br. 33–41) that declarations of third persons outside his presence and knowledge were inadmissible against him, the rulings complained of concern merely the admission of a few items of evidence in a lengthy record which, even putting this evidence aside, estab-

lishes petitioner's guilt of the crime of which he was charged. And the courts of appeals which have had an opportunity to consider the issue of such third-party declarations in similar cases arising under the Smith Act, have unanimously rejected his contention (see cases cited, *infra*, p. 53). Thus, the error, if any, is in no sense an "obvious" one.

Moreover, petitioner does not suggest any mitigating circumstances for his failure to raise the issue of the validity of the trial court's rulings in the court below. He was adequately represented by the same counsel in the trial court and the court of appeals. That counsel obviously felt that petitioner's interests would be better served if reversal of his conviction was sought in the court below on more substantial grounds than the one revived here. The fact that petitioner's present counsel apparently disagrees with his former counsel on this score does not justify ignoring an established policy of this Court.

B. INADMISSIBLE EVIDENCE WAS NOT RECEIVED

Even if petitioner had preserved his objections to the admissibility of evidence by raising the issue in the court of appeals, nevertheless his contentions would have to be rejected as meritless.

1. *The Lautner opinion testimony.* Petitioner complains (Pet. Br. 35–36) that Lautner was permitted to give "prejudicial opinions" which were incompetent, irrelevant, and inflammatory. He cites first (Pet. Br. 35) Lautner's testimony that the dictatorship of the proletariat, especially in a country like the United States, "cannot be achieved peacefully"

but only "by force, challenge and violence" (R. 195). According to petitioner, this testimony was inadmissible because it was allegedly given as his own opinion, not that of the Communist Party or petitioner, and because, in any event, the issue under the statute was not what the Party believed would ultimately be necessary but what it presently advocated.

Lautner was a high-level Party functionary whose membership dated back some twenty years at the time of his break with the Party in 1950. His background, as the record reflects, included attendance throughout this period, as a student and teacher, at some of the Party's highest schools at which it systematically taught the principles of Marxism-Leninism. He also actively participated as a leader in the Party's main programs (see *infra*, pp. 61–62). The bulk of Lautner's testimony (see R. 5–196) was concerned with relating to the court and jury the substance of what he was taught and what he himself as a certified representative of the Party later taught at schools and classes (see *infra*, pp. 62–66, 67–68). Thus, Lautner qualified as an expert who was in a position to know what the Party stood for and how it functioned. R. 194; *United States* v. *Lightfoot*, 228 F. 2d 861, 867 (C.A. 7), reversed on other grounds, 355 U.S. 2; cf. *United States* v. *Mesarosh*, 223 F. 2d 449, 455 (C.A. 3), reversed on other grounds, 352 U.S. 1; *Frankfeld* v. *United States*, 198 F. 2d 679, 689 (C.A. 4), certiorari denied, 344 U.S. 922; *United States* v. *Dennis*, 183 F. 2d 201, 229 (C.A. 2), affirmed, 341 U.S. 494. Having provided the jury with detailed factual in-

formation upon which his opinion was explicitly based (R. 194), he could properly conclude his testimony by summarizing the Party's teachings and advocacy.

It is clear, of course, as petitioner concedes (Pet. Br. 35), that the nature of the Communist Party, its teachings and objectives, was a material issue in this case. And it is equally clear, particularly when read in context, that Lautner's testimony was directly relevant to this issue. Lautner was describing the objectives of the Communist Party from 1929 to 1950 (R. 195–196)—objectives which the Party was, during that period and afterward, actually attempting to accomplish (see *supra*, pp. 36–38). For example, Lautner stated that one of the conditions necessary before the Party could seize power by violence was leadership "of the decisive sections of the working class" (R. 195); and the record demonstrates that petitioner himself was active in a program to achieve just such leadership (*supra*, pp. 17–20). The fact that the Party did not advocate that violence be used until the future when "the time [is] ripe" (*Yates* v. *United States*, 354 U.S. at 332), rather than at the present moment, does not render such evidence irrelevant. Just such advocacy of violence when circumstances will permit satisfies the standards laid down in *Yates* (see *supra*, pp. 33–34).

Petitioner also contends (Pet. Br. 36) that it was error to permit Lautner to testify that certain provisions of the Party Constitution were "protective language" and "double talk" (R. 187–193). As we have noted, Lautner's experiences in the Party qualified

him as an expert concerning the Party's teachings and objectives. This experience also qualified him to explain the meaning of terms and passages in the Party's constitution as they were understood by its members and initiates during the period of his membership. As a leading member of the Party for more than twenty years, he was in a position to acquire knowledge of the common understanding of its members and, as a teacher at Party schools, he himself helped to shape their understanding. In a similar situation, in *Dennis,* a former Party leader was allowed to testify in behalf of the government that the Party constitution contained "passages * * * which were innocent upon their face, but which were understood by the initiate to be only a cover—'window dressing'—for the violent methods advocated and taught" (183 F. 2d at 229). In response to a contention that the testimony was inadmissible, Judge Hand stated that "[t]his was so patently competent evidence that it needs no discussion" (*ibid.*). See also *United States* v. *Mesarosh, supra,* 223 F. 2d at 455.

Nor is it true, as petitioner contends (Pet. Br. 36), that Lautner's testimony concerning the experience of the Yugoslav and other Eastern European Communist Parties, after they refused "to bend under Stalin's leadership" (R. 186–187), did not have "the slightest relevance to any issue in this case." The purpose of this testimony was to explain a particular passage from an article appearing in the November 1948 issue of *Political Affairs* (G. Ex. 49), the Party's official theoretical organ (R. 181), which had been previously read to the jury (R. 185–186). In the

article, the writer had stated that "[t]he fight against * * * Browderism must continue * * * [and] become intensified in the light of the * * * struggle * * * waged by all Communists against the anti-Marxist, anti-Leninist, bourgeois nationalist positions of the leaders of the Yugo Slav Communist Party" (G. Ex. 49, p. 1010; R. 186). The record already included evidence showing that when Browder was expelled in 1945 the Party had rejected his "revisionist" policies, which, according to Party leaders, included peaceful coexistence with capitalism and the end of the class struggle (R. 90–105; see *infra*, p. 66). Thus, Lautner's testimony, coupled with the statement in *Political Affairs*, shows that "revisionism"—the rejection of the revolutionary and violent objectives of Marxism-Leninism (called Browderism in the United States, bourgeois nationalism in Eastern Europe)—was still being vigorously opposed three years later in 1948, not only in the United States but throughout most of the Communist world, under the direction of the highest leader in international Communism. As such, the testimony was properly received as an explanation by a qualified expert of a statement made in an official Party document, and was clearly relevant to the Party's teaching and advocacy.

2. *The third-party declarations.* Petitioner next argues (Pet. Br. 37–41) that it was error to admit, as evidence, statements made by other Party members which were not made in his presence and of which he had no knowledge.[16] This evidence was introduced to

[16] This issue is also raised in a similar, although not precisely the same, form in *Scales* v. *United States*, No. 8, this Term. See our 1958 brief in that case, pp. 113–116.

prove the nature and character of the Communist Party during the period covered by the indictment. One of the elements of the offense defined by the "membership" clause of the Smith Act—the first element to be proved—is that the group or society was, during the pertinent period, one which taught and advocated the forcible overthrow of the Government. Although *knowing* membership must be proved in addition, the first step, legally and logically, must necessarily be proof of the character of the organization. To limit such proof to acts and statements of the particular individual charged with knowing membership in the organization (or done or uttered in his presence) is incorrect. If petitioner's contention that this is required were valid, the nature of the Party, a material issue, could never be proved. For the Party is by definition a group. And the group's character could not be known by examining only the acts and statements of an individual member in isolation; instead, the only way to prove the character of an organization is to adduce evidence of the authoritative acts, statements, and publications of its officers, leaders, and official spokesmen.

Of course, where the individual defendant in a membership case is, as here, a high-ranking officer and leader of the Party, proof of the character of the Party may (and would normally be expected to) include (as it did here, *supra,* pp. 6–26) individual acts and statements of the defendant himself. But there is surely no merit to the argument that it must be *limited* to such individual acts and statements. As the Court of Appeals for the Fourth Circuit noted in

commenting on similar evidence (*Scales* v. *United States*, 260 F. 2d 21, 29, pending on certiorari, No. 8, this Term):

> That part of the evidence which pertained to the activities of the Party with which * * * [the defendant] had no immediate connection was relevant, since it tended to prove the allegations of the indictment that the Communist Party of the United States was a group of persons who taught and advocated the overthrow of the Government of the United States by force and violence.

See also *United States* v. *Lightfoot*, *supra*, 228 F. 2d at 867; *Scales* v. *United States*, 227 F. 2d 581, 589–592 (C.A. 4), reversed on other grounds, 355 U.S. 1; cf. *United States* v. *Mesarosh*, *supra*, 223 F. 2d at 454–455; *Frankfeld* v. *United States*, *supra*, 198 F. 2d at 689; *United States* v. *Dennis*, *supra*, 183 F. 2d at 230.

Nor was the government's evidence, as petitioner contends (Pet. Br. 41), "too remote to have relevance." Like the evidence adduced in many of the other prosecutions under the Smith Act, the evidence here "contained links in Party teachings sufficient for the jury to find a continuity of Party purposes and teachings through the 1930's up to the indictment period." *United States* v. *Mesarosh*, *supra*, 223 F. 2d at 455. The evidence relating to events antedating the enactment of the Smith Act, coupled with proof of the Party's more recent activities, provided the jury with the necessary information to evaluate properly the Party's real objectives and teachings. Moreover, the time factor was an evidentiary matter peculiarly for

the judgment of the trial judge in considering the general problem of relevancy. As the court below observed in *Dennis, supra*, 183 F. 2d at 231:

> [I]t is nonsense to say that events occurring before a crime, can have no relevance to the conclusion that the crime was committed; and declarations are no different from any other evidence. How far back of the commission of the crime one may go is a matter of degree, and within the general control of the judge over the relevancy of evidence. * * * The same doctrine applies to evidence occurring before the acts charged had become a crime at all * * *.

See also *United States* v. *Lightfoot, supra,* 228 F. 2d at 867. The same sound basis for sustaining the trial court's discretionary ruling exists here.

III

SECTION 4(f) OF THE INTERNAL SECURITY ACT OF 1950 DOES NOT BAR PROSECUTION UNDER THE MEMBERSHIP CLAUSE OF THE SMITH ACT

Petitioner contends (Pet. Br. 42–51) that Section 4(f) of the Internal Security Act of 1950 (50 U.S.C. 783(f)) was intended to immunize Communists from prosecution under the membership clause of the Smith Act. This identical point was raised in *Scales* v. *United States,* No. 8, this Term, and is discussed in both our original 1958 brief, pp. 68–74, and in our 1959 brief on reargument, pp. 33–36, in that case. We respectfully refer the Court to that material.

IV

THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO THE FACTS OF THIS CASE

A. VALIDITY OF THE CLAUSE ON ITS FACE

In our 1958 brief in *Scales*, pp. 38–56, we undertook to show that, on the basis of the principles enunciated by this Court in *Dennis* v. *United States*, 341 U.S. 494, and reaffirmed in *Yates* v. *United States*, 354 U.S. 298, the membership provision of the Smith Act is valid on its face. In our brief following this Court's order of June 29, 1959, 360 U.S. 924, setting *Scales* for reargument and requesting counsel to address themselves to specified questions, we discussed (pp. 5–33) various additional aspects of this issue. We respectfully refer the Court to the discussion in those briefs in answer to petitioner's arguments (Pet. Br. 52–65, 69, 85) attacking the constitutionality of the clause on its face.

B. VALIDITY OF THE STATUTE AS APPLIED IN THIS CASE

Petitioner contends that the membership clause is unconstitutional as applied in this case (Pet. Br. 65–69, 83) because the government failed to prove, as to the indictment period, first, that petitioner was an active member of the Party (Pet. Br. 83) or that the Party advocated violence (Pet. Br. 66); and, second, that any of petitioner's or the Party's activities constituted a significant danger (Pet. Br. 65–66). We submit, however, that if, as we have urged, the membership provision is generally valid, there can be little doubt

that it could be and was constitutionally applied in this case.

Earlier in this brief, in discussing the requirements of the *Yates* case (pp. 36–38), we showed that the record sustained the jury's finding that the Party, prior to the limitation period, was not only advocating violent revolution, but was taking concrete action toward forcefully overthrowing the Government as speedily as circumstances would permit. Thus, the Party was implementing its industrial concentration program and establishing an underground apparatus, both of which were initial steps in carrying out its illegal revolutionary aims. Similarly, we have shown (pp. 42–44) that petitioner understood, supported, and intended the achievement of the Party's ends; that he was no mere innocent or trivial underling, but a leader in the industrial concentration program and in both the overt and underground organizations with control over a significant area; and that he engaged aggressively in the Party activities his active membership and leadership entailed. In sum, as the court below stated (R. 448; 262 F. 2d at 508), petitioner "was shown to be a leader steeped in Party discipline and dedicated to its objectives."

As we noted before (pp. 39–41), it is a natural and reasonable inference that both the Party's advocacy of violent action and petitioner's activity—which were proved to have existed for a number of years up to the eve of the limitation period—continued throughout that period in the absence of any substantial evidence to the contrary. Moreover, petitioner's own statements and conduct after Sep-

tember 1, 1951, and within the period not barred by limitations, show that petitioner continued to participate actively in that Party program—its underground apparatus—which clearly demonstrates that the Party continued to advocate violent and illegal action. Petitioner, having been previously selected to enter the underground as one of the Party's elite ten percent of highly devoted and disciplined members, was operating in disguise during the limitations period while awaiting instructions from his superiors. Later in the limitations period, apparently on orders, he moved to another city and took employment in a basic industry, in disguise and under a false name, presumably in the interests and under orders of the Party.

It is, of course, true that neither petitioner nor the Party as a whole had power at that time to overthrow the Government by force. But it was no less clear in *Dennis* that the Party, without the events which were anticipated, lacked such power currently or for at least the near future. Thus, *Dennis* teaches that Congress may act against "an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists * * *." 341 U.S. at 509. The power which entitled Congress to act against a conspiracy to organize the Party is at least equally available to strike against the Party-in-being in the only way the Party can function and be reached—through its members. The fact that each member in isolation, even a leading member, may seem insignificant cannot bar Congress from dealing with the "ingredients

of the reaction * * *." *Dennis*, 341 U.S. at 511. Just as the nation's commerce may be protected by dealing with individual instances which taken alone lack consequence (*e.g., Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 647–648), the Communist Party's threat to the national security may be reached through the members who comprise it, at least where those members have the active purpose to help the Party achieve its unlawful objectives. Such members may be the leaders who undertake to launch violent action when "the circumstances permit", or the indoctrinated followers who will readily and enthusiastically answer the call (*Dennis*, 341 U.S. at 509, 511). Petitioner was a "rigidly disciplined" member and leader of the conspiratorial group, ready to plan and carry out the Party's unlawful objectives.[17]

Petitioner further claims (Pet. Br. 66–69) that this Court in *Dennis* found a clear and present danger only because of the tense international situation at the time, and that this situation no longer exists. This contention is obviously without substance. The period here

[17] In this case, the trial court did not make any explicit charge to the jury concerning the factor of "activity" (as was done in *Scales*). For our views on that factor, see our 1959 brief on reargument in *Scales*, pp. 21–28. As applied to the present case, our position is that that factor was comprehended within the term "membership" in the indictment and charge, and was proved by the evidence; and if "activity" is viewed as an overriding constitutional standard (like "clear and present danger"), it existed here.

in question (September 1951–November 1954)[18] began just after the outbreak of fighting in Korea. During most of this period, the United States was engaged in armed combat against Communist North Korea and forces from Communist China. It scarcely requires argument that that period was not constitutionally less fraught with clear and present danger than was the time from 1945 to 1948 considered by this Court in *Dennis* in 1951. Petitioner's contrary view was shortly and sufficiently answered in *United States* v. *Flynn,* 216 F. 2d 354, 367 (C.A. 2), certiorari denied, 348 U.S. 909, where the court said that "if the danger was clear and present in 1948, it can hardly be thought to have been less in 1951, when the Korean conflict was raging and our relations with the Communist world had moved from cold to hot war." See also *United States* v. *Lightfoot,* 228 F. 2d 861, 870 (C.A. 7), reversed on other grounds, 355 U.S. 2; *Scales* v. *United States,* 260 F. 2d 21, 37 (C.A. 4), pending on certiorari, No. 8, this Term.

[18] Even if petitioner were correct in assuming that the Communist Party is no longer a clear and present danger in view of the present international situation, this is immaterial. It is enough that the Party posed a clear and present danger during the indictment period and, more paricularly, that portion of the indictment period within the statute of limitations.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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APPENDIX

SUMMARY OF THE EVIDENCE (NOT SPECIFICALLY LINKED TO PETITIONER) THAT THE COMMUNIST PARTY WAS DURING THE INDICTMENT PERIOD AN ORGANIZATION WHICH TAUGHT AND ADVOCATED THE FORCIBLE OVERTHROW OF THE GOVERNMENT OF THE UNITED STATES AS SPEEDILY AS CIRCUMSTANCES WOULD PERMIT

A large part of the evidence relating to the character of the Communist Party during the indictment period which did not relate directly to petitioner was introduced through the testimony of prosecution witness John Lautner (R. 5–196, 202–206; G. Exs. 8–63). Lautner was one of the leading members of the Communist Party at the national level prior to 1950. Expelled from the Party in that year (R. 175), he was, at the time, a member of the National Review Commission, the Party's top security body, as well as the Chairman of the New York State Review Commission (R. 6, 22).

Lautner first joined the Communist Party in 1929 (R. 5). Throughout the period of his membership he attended many of the Party's National Conventions including those held in 1936, 1938, 1940, 1945, and 1948 (R. 26). In 1930 he was a pupil at the Party's National Training School in New York, together with some twenty other students (R. 8–9, 26–27). Later, in 1941, he again attended this National Training School, described as the "highest" conducted under Party auspices, together with six other Party leaders (R. 19–20, 21, 68–71). Lautner himself was a teacher at various Party schools and classes from 1933 to 1936 (R. 47, 48, 61), and from 1946 to 1948 (R. 28–29,

63–66, 72, 122–123, 127–129, 135–138, 140–144, 155–156).

Lautner testified that, based upon his twenty years' experience in the Communist Party as a student and teacher at Party schools, as a national leader of the Party, and as a participant at many of its meetings and national conventions, it was his opinion that the ultimate aim and objective of the Communist Party of the United States was "to destroy capitalism, monopoly capitalism, materialism" when "two sets of conditions" historically coincided (R. 194–195). These conditions, known as "objective" and "subjective" conditions were explained by Lautner as follows (R. 195):

> Objective conditions on one hand are if there is a crisis, economic crisis or a war, a situation where the Government is not able to exert its opinion and function with the established accepted methods, when sections of the population are dissatisfied with the existing conditions. In this crisis there is a wide dissatisfaction. These are one set of conditions. On the other hand, if paralleled with this situation [the] following subjective conditions are present. 1, that the Communist Party is the vanguard, the leader of the decisive sections of the working class. In addition to that, the Communist Party has influence over wide sections of the so-called allies of the working class, like poor farmers, negro people. In addition to that when the Communist Party succeeded in neutralizing sections of the population amongst the lower middle classes, when these two conditions exist, on one hand objective and the subjective conditions, the Communist Party is ready to challenge and aims to destroy capitalism, mo-

nopoly capitalism, and achieve its final objective, establishment of socialism through the dictatorship of the proletariat.

Lautner further testified, based upon his Party experiences, that (except for a brief period from 1944 to 1945) the Party advocated that this change to socialism and the establishment of the dictatorship of the proletariat "particularly in a highly developed country like the United States, cannot be achieved peaceful[ly]" but only by "force, challenge and violence" (R. 195, 195–196).

These conclusions were based on Lautner's knowledge of the systematic instruction at Party schools and classes throughout the period of his membership. Thus, Lautner testified that the substance of the following passages from so-called Marxist-Leninist "classics" were taught in the 1941 National Training School and in the classes which he himself later taught from 1946 to 1948:

> *Problems of Leninism* (G. Ex. 14, R. 63): Can such a radical transformation of the old bourgeois system of society be achieved without a violent revolution, without the dictatorship of the proletariat? Obviously not. To think that such a revolution can be carried out peacefully within the framework of bourgeois democracy, which is adopted to the domination of the bourgeoisie, means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the proletarian revolution. [*Id.*, pp. 19–20; R. 135–136, 137.]
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> * * * * *
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> The scientific concept, dictatorship, means nothing more nor less than power which directly rests on violence which is not limited by

any laws or restricted by any absolute rules. Dictatorship means, note this once and for all, Messrs. Cadets, unlimited power, resting on violence and not on law. During civil war, victorious power can only be dictatorship. [*Id.*, p. 25; R. 137, 137–138.]

History of the Communist Party, Soviet Union (*Bolsheviks*) (G. Ex. 20; R. 66):

Marx and Engels taught that it was impossible to get rid of the power of capital and to convert capitalist property into public property by peaceful means, and that the working class could achieve this only by revolutionary violence against the bourgeoisie, by a proletarian revolution, by establishing its own political rule, the dictatorship of the proletariat, which must crush the resistence of the exploiters and create a new classless, Communist society. [*Id.*, p. 9; R. 129.]

* * * * *

The Marxist-Leninist Theory is not a dogma, but a guide to action. [*Id.*, p. 356; R. 129.]

State and Revolution (G. Ex. 15, R. 63):

Have these gentlemen ever seen a revolution? Revolution is undoubtedly the most authoritative thing possible. It is an act in which one section of the population imposes its will on the other by means of rifles, bayonets, cannon, *i.e.*, by highly authoritative means, and the victorious party is inevitably forced to maintain its supremacy by means of that fear which its arms inspire in the reactionary. [*Id.*, p. 53; R. 142, 141–142.]

Foundations of Leninism (G. Ex. 13, R. 63):

* * * The strategy and tactics of Leninism constitute the science of leadership of the revo-

lutionary struggle of the proletariat. [*Id.*, p. 89; R. 132, 132–133.]

* * * * *

What is the difference between revolutionary tactics and reformist tactics?

* * * * *

To a reformist, reforms are everything, while revolutionary work is something incidental, something just to talk about, mere eyewash. That is why, with reformist tactics under the bourgeois regime, reforms are inevitably transformed into an instrument for strengthening that regime, an instrument for disintegrating the revolution.

To a revolutionary, on the contrary, the main thing is revolutionary work and not reforms; to him reforms are by-products of the revolution. That is why, with revolutionary tactics under the bourgeois regime, reforms are naturally transformed into instruments for disintegrating this regime, into instruments for strengthening the revolution, into a base for the further development of the revolutionary movement.

The revolutionary will accept a reform in order to use it as an aid in combining legal work with illegal work, to intensify under its cover, the illegal work for the revolutionary preparation of the masses for the overthow of the bourgeoisie. [*Id.*, p. 103; R. 133–134, 135.]

In the 1930 and 1941 National Training Schools, in the classes which Lautner taught in the late 1940's, and in Party publications, Party instructors and leaders continuously emphasized that Marxist-Leninist principles applied to the United States, and

they condemned so-called "American Exceptionalism"—the doctrine that the United States is exempt from the basic laws of Marxism-Leninism and that it is possible that the transition to socialism in this country may be accomplished peacefully (R. 31–32, 130–132, 141–142; G. Exs. 34, 37, R. 110, 114–115).

In 1944 the Communist Party was reorganized as the Communist Political Association (R. 87). In July 1945, however, an emergency national convention reconstituted the Communist Party (R. 93). This action was taken following severe criticism throughout the Party of the "revisionist"[1] policies of its then General Secretary, Earl Browder (G. Exs. 26, 27, 29; R. 88–93, 97–98). The convention passed a resolution[2] (R. 94–96, 99–100) which, after noting that Browder's errors had led to the "false concept of social evolution" and "to revision of the fundamental laws of the class struggle" (G. Ex. 27, p. 96; R. 95), resolved "to overcome quickly our errors and mistakes" by "enhancing the Marxist understanding of our entire organization and leadership" (G. Ex. 27, p. 99; R. 96).

Reports made to the convention by national leaders William Z. Foster and John Williamson emphasized the need to reorganize the Party, to re-educate the members and leadership in the principles of Marxism-Leninism, and to establish "firm roots in the working class" (G. Ex. 27; R. 101–105). Following the Convention, the Party embarked upon a "three-pronged"

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[1] Revisionism was defined by Lautner as "an effort to revise the basic concept of Marxism-Leninism" (R. 88).

[2] The resolution was published in *Struggle Against Revisionism* (G. Ex. 27; R. 90) and the September 1945 issue of *Political Affairs* (G. Ex. 30; R. 100), the Party's official theoretical organ (R. 97), both of which contain the basic documents of the convention (R. 100).

national program of reorganization, re-education, and concentration of activities in the basic industries (R. 105–122; G. Exs. 31–39).

Lautner participated in all three phases of this program (R. 105). In 1946 he was assigned by top leaders of the New York State Party organization the task of reorganizing the State Party into industrial sections (R. 120–121). During the same period, he was assigned to the Chelsea "concentration" region in Manhattan, which encompassed a large part of the New York City waterfront, to try to build up Party membership in the transport industry in accordance with the main concentration task given to the state organization by the national leadership (R. 121).

From 1946 through 1948, Lautner taught classes in Party schools in New York City (R. 122–213, 63). Among the courses he taught were "Marxism-Leninism", "Political Economy", "Party Organization", "Party Structure" and "Democratic Centralization [*sic*] and Discipline" (R. 121). Copies of an outline issued by the Party's National Educational Commission entitled *Outline on Fundamentals of Marxism* (G. Ex. 40) were given to him to use as a guide in teaching these courses (R. 125–127). This *Outline* divided the subject of Marxism-Leninism into nine "Lessons," suggesting the material to be covered in each lesson and the Marxist-Leninist "classics" or selections therefrom to be read and studied in connection with the lessons.[4] In teaching the courses, Lautner used many of the texts which the *Outline* designates as reading assignments, including *Foundations of Lenin-*

[4] Most of the passages from the "classics" which we have previously set forth (*supra*, pp. 63–65), are included within the reading assignments under one or more of the "Lessons" in the *Outline* (see G. Ex. 40).

ism (G. Ex. 13), *Problems of Leninism* (G. Ex. 14), *State and Revolution* (G. Ex. 15), and *History of the Communist Party, Soviet Union (Bolsheviks)* (G. Ex. 20) (R. 127–128).

At the 1948 national convention, conducted under strict security regulations (R. 151–152), the Party again repudiated the "revisionism" of Browder and reaffirmed the action taken at the 1945 convention in reconstituting itself on a Marxist-Leninist basis (R. 153). After the convention, the Party began nationally to organize ten per cent of its membership in an underground apparatus parallel with the existing Party structure (R. 164–166). Witness Lautner was assigned the task of building in New York this underground organization of about 3,000 members (R. 164). The system utilized was modeled after similar ones which had been used previously by European Communist parties (R. 165–166). The basic structure was a pyramid consisting of seven levels, each level from the top down containing a larger number of three-member groups, each three-member group connected to a single member of a three member-group at a higher level. As a result of this system each Party member knew only the two other members in his group, a single member from a higher level and three other members at a lower level (R. 166–168). In addition, the system had "horizontal aspects" (R. 164) which included a communication system consisting of printing presses and "drop places" for leaving messages as well as hiding places for Party leaders (R. 164–165). Before Lautner was expelled in 1950, the Party had been successful in building the underground apparatus in New York all the way down to the seventh level (R. 170) and was manufacturing its own mimeograph machines to supply this system (R. 172–173).

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